FILE COPY

In the Supreme Court of the United States

OCTOBER TERM, 1932

No. [redacted] 1

FIDELITY AND DEPOSIT COMPANY OF MARYLAND, a corporation,

Petitioner,

vs.

GEORGE C. ARENZ,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT — BRIEF IN SUPPORT THEREOF.

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OCTOBER TERM, 1932

No.....

FIDELITY AND DEPOSIT COMPANY OF MARYLAND, a corporation,

Petitioner,

vs.

GEORGE C. ARENZ,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT and BRIEF IN SUPPORT THEREOF.

TO the Honorable The Supreme Court of the United States:

Comes now the Fidelity and Deposit Company of Maryland, a corporation, and petitions this Honorable Court for review on Writ of Certiorari of the decision of the United States Circuit Court of Appeals for the Ninth Circuit in the above entitled proceedings and respectfully shows the Court:

STATEMENT OF MATTER INVOLVED.

The sole matter submitted for determination in this proceeding is whether or not the obtaining by a bankrupt, prior to bankruptcy, of a surety bond in a fixed penal sum guaranteeing the faithful performance by the bankrupt of a contract then entered into by him with the obligee named in the bond, which said bond is obtained by him by virtue of a materially false statement in writing respecting his financial condition, is a bar to his discharge in bankruptcy and constitutes "obtaining money or property on credit, or obtaining an extension or renewal of credit, by making or publishing, or causing to be made or published, in any manner whatsoever, a materially false statement in writing respecting his financial condition," where the surety, pursuant to the transaction, suffers a loss of $10,000.00.

REASONS FOR ALLOWANCE OF WRIT

Your petitioner relies upon the following reasons for the allowance of this writ, and submits that the Circuit Court of Appeals for the Ninth Circuit has,

I.

Rendered a decision in conflict with the decision of another Circuit Court of Appeals on the same matter.

II.

Decided an important question of Federal Law which has not been, but should be, settled by this

Court.

III.

Decided a Federal question in a way probably in conflict with applicable decisions of this Court.

WHEREFORE, your petitioner respectfully prays that a Writ of Certiorari be issued out of and under the Seal of this Honorable Court directed to the Circuit Court of Appeals for the Ninth Circuit, commanding that court to certify and to send to this Court, for its review and determination, on a date certain to be therein named, a full and complete transcript of the record and all proceedings in the case, numbered and entitled on its docket No. 6865, in the Matter of George C. Arenz, Bankrupt, Fidelity and Deposit Company of Maryland, a corporation, Appellant, vs. George C. Arenz, Appellee, and that the said judgment and decree of the said Circuit Court of Appeals for the Ninth Circuit may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioner will ever pray.

Fidelity and Deposit Company of Maryland,

ELTON WATKINS,
JOHN LICHTY,
ROBERT CLAPPERTON,
Counsel for Petitioner.

BRIEF IN SUPPORT OF PETITION

I.

THE OPINION OF THE COURT BELOW.

The opinion of the Circuit Court of Appeals is reported in the Federal Reporter Advance Sheet for December 26, 1932, Fidelity and Deposit Company of Maryland, a corporation, vs. George C. Arenz, 61 Fed. (2d) 607, and has been printed in the record filed herein. (R. 10).

II.

JURISDICTION.

1. The jurisdiction of the Supreme Court of the United States is invoked under Section 240 of the Judicial Code, as amended by the Act of February 13, 1925, 43 Stats. 938.

The date of the judgment to be reviewed is November 7, 1932. (R. 70).

III.

STATEMENT OF THE CASE.

On the 4th day of May, 1931, the respondent, George C. Arenz, filed, in the District Court of the United States for the District of Oregon, a petition praying that he be adjudged a bankrupt, and on the said date he was, by the said Court, duly and regularly adjudged bankrupt.

On the 10th day of July, 1931, your petitioner filed in the Bankruptcy Proceedings its proof of claim of an

indebtedness of the bankrupt to your petitioner of $10,000.00. (R. 22).

Upon the 20th day of July, 1931, the bankrupt filed his petition for discharge. (R. 20).

On the 21st day of August, 1931, your petitioner filed Specifications and Objections to the discharge of the Bankrupt. (R. 26).

The bankrupt demurred to the Specifications so filed (R. 30), and on the 18th day of January, 1932, the Judge of the District Court signed an order sustaining the demurrer and giving your petitioner 5 days to file Amended Specifications (R. 32).

The Amended Specifications (R. 33 to 39) contained allegations of the following facts:

That on or about the 15th day of May, 1929, the bankrupt made a false financial statement in writing as an inducement to secure the execution by your petitioner of a surety bond, with the bankrupt as principal, running to the State of Oregon, in the sum of $71,306.25, and that the statement did induce the execution of such bond, which bond was delivered to the State of Oregon, guaranteeing the performance by the bankrupt of a certain contract with the State of Oregon; that by virtue of having executed the said bond for the said bankrupt, the Fidelity and Deposit Company of Maryland became legally obligated to pay, and did pay, a certain judgment entered against the bankrupt and surety jointly, in favor of the Oregon City Sand and Gravel Company, a corporation, in the sum of $10,000.00; that the financial statement

furnished to your petitioner by the bankrupt was materially false, setting out in the Specifications the particulars in which it was false.

As a second Specification your petitioner alleged that the bankrupt had obtained an extension of credit from it upon a materially false statement in writing made by him, to-wit; for the purpose of obtaining such extension of credit, the financial statement being referred to being the same financial statement referred to in the first Specification and showing the same facts as alleged in support of the first specification.

The bankruptcy interposed a demurrer to the amended Specifications (R. 40), and the District Court sustained such demurrer and ordered that the bankrupt be discharged, pursuant to the provisions of the United States Bankruptcy Act. (R. 41 and 42).

An appeal was perfected to the Circuit Court of Appeals for the Ninth Circuit; the appeal was argued and submitted, and, in an opinion filed November 7, 1932, the Circuit Court of Appeals affirmed the judgment and decree of the District Court. (R. 60 to 69).

Pursuant to that opinion, judgment of the Circuit Court of Appeals was entered affirming the judgment of the District Court. (R. 70).

IV.

ARGUMENT.

Summary of the Argument.

Point A. The Circuit Court of Appeals for the Ninth Circuit has, by its decision below, erroneously

decided an important question of Federal Law which has not been, but should be, settled by this Court.

Point B. The decision below is in conflict with a prior decision of a Circuit Court of Appeals of another Circuit.

Point C. The Court below has decided a Federal question in a way probably in conflict with applicable decisions of this Court.

POINT A.

Important question of Federal Law which has not been, but should be, settled by this Court.

The Federal Statute, interpretation of which is sought by this proceeding, is the Act of July 1st, 1898, Chapter 541, Section 14, 30 Stat. 550, as amended by the Act of May 27, 1926, Chapter 406, Section 6, 44 Stat. 663, Title 11, United States Code, Section 32, the pertinent part of which reads as follows:

> "(a) Any person may, after the expiration of one month and within twelve months, subsequent to being adjudged a bankrupt, file an application for a discharge in the Court of Bankruptcy in which the proceedings are pending, if it shall be made to appear to the judge that the bankrupt was unavoidably prevented from filing it within such time, it may be filed within, but not after, expiration of the next six months.
>
> "(b) The judge shall hear the application for a discharge and such proofs and pleas as may be made in opposition thereto by the trustee or other

parties in interest, at such time as will give the trustee or parties in interest a reasonable opportunity to be heard; and investigate the merits of the application and discharge the applicant, unless he has * * *, (3) obtained money or property on credit, or obtained an extension or renewal of credit, by making or publishing, or causing to be made or published, in any manner whatsoever, a materially false statement in writing respecting his financial condition;"

We are asking that the Court interpret this statute in such a manner that it will deny to a bankrupt the benefit of a discharge, where the bankrupt has obtained a surety bond by virtue of a materially false financial statement in writing and has caused the surety a monetary loss by virtue of having executed the bond, relying upon the truthfulness of the financial statement.

The business of corporate suretyship has, within the past few years, assumed an important place in the business and commercial life of this country. Suretyship obligations totaling hundreds of millions of dollars are annually undertaken by the surety companies.

When an application is made to a surety company for a bond or undertaking, the first question which presents itself is the financial responsibility of the principal who is requesting the bond.

Just as a bank, in loaning its money, needs an accurate statement of its borrowers' financial condition, so the surety company, in selling its credit, must first

know the extent of the ability of its principal to respond in the event of loss under the bond.

If a bankrupt has obtained credit in the purchase of an automobile, or any other chattel, by virtue of a materially false financial statement, the decisions are uniform that, under the above quoted statute, discharge will be refused to him.

It will indeed result in an anomalous situation if the same man can, with impunity, falsify a financial statement by which he obtains a surety bond, obligating the surety to pay thousands of dollars, under which the surety actually loses $10,000.00, and then obtain a discharge in bankruptcy on the grounds that he has not obtained money or property on credit.

Your petitioner does not believe that that is the law, but that is the result of the holding of the Court below, and we feel that the matter is of sufficient importance to be settled by this Court.

POINT B.

CONFICT WITH PRIOR FEDERAL DECISIONS

On June 12, 1928, the Circuit Court of Appeals for the Fourth Circuit decided the case of Royal Indemnity Co. vs. Cooper, 26 Fed. (2d) 585, and the major part of that decision reads as follows:

> "This is an appeal from a decree entered on December 23, 1927, in the District Court of the United States for the Eastern District of North Carolina, granting a discharge to W. B. Cooper, appellee.

There were two grounds of objections to the bankrupt's discharge filed by the appellant, Royal Indemnity Company—the first being that, in obtaining from the said Indemnity Company a bond to secure deposits of the State of North Carolina in the Commercial National Bank of Wilmington, N. C., the bankrupt filed with aplant a statement of his financial condition on January 1, 1922, which statement was untrue and materially false, and that, upon failure of the bank, a recovery of more than $25,000. had been had upon the bond; the second ground of objection being that the bankrupt, subsequent to the filing of his petition in bankruptcy, transferred, removed, destroyed, and concealed his property with intent to hinder, delay and defraud his creditors.

In sustaining the demurrer to the first specification, the court below cited as authority the case of In re Ford (D. C.) 14 F. (2d) 848, and held that the obtaining of a bond, even by giving an admittedly false statement, did not constitute, under the Bankruptcy Act (11USCA), a bar to bankrupt's discharge. Attorneys for appellee also rely upon In re Tanner (D. C.) 192 F. 572.

The application for the discharge was passed upon after the passage of the amendment of 1926 to the Bankruptcy Act, section 6 of which amendment reads as follows:

'(3) * * * Obtained money or property on

credit, or obtained an extension or renewal of credit, by making or publishing, in any manner whatsoever, a materially false statement in writing respecting his financial condition.' 11 USCA Sec. 32 (b), (3).

* * * *

We therefore conclude that, under the pleadings in this case, the trial judge erred in sustaining the demurrer.

(3) It is contended on behalf of the bankrupt that the bond was not obtained for himself, but for the bank in which he was a director, and that, therefore, the first specification in opposition to the discharge was not sufficient to bring the objection within the purview of the statute. In the case of Levy v. Industrial Finance Corporation et al, 48 S. Ct. 298, 72 L. Ed. ** (decided March 5, 1928), Mr. Justice Holmes says:

'A man obtains his end equally when that end to induce another to lend to his friend and when it is to bring about a loan to himself. It seems to us that it would be a natural use of ordinary English to say that he obtained the money for his friend. So when the statute speaks simply of obtaining money, the question for whom the money must be obtained depends upon the context and the policy of the act.'

(4) It is not necessary to quote authority to the effect that the statute must be construed strictly as against the objector, and liberally in favor of the bankrupt, yet such rule of construc-

tion should not be so applied as to deprive the words of the statute of their common and accepted meaning. To do so would be to carry the reason of the rule to an absurd length.

We cannot agree that the reasoning in the two cases relied upon by appellee is controlling here. The bankrupt had given his personal bond to secure the deposit of state funds in the bank, and had deposited collateral for the same purpose, and in securing the bond from the appellant, if he did not obtain money or property on credit, he did at least obtain an extension of credit for the bank. If he was sufficiently interested in the bank to bring him within the rule of the Levy case, then the effect was the same as if he had obtained the extension of credit for himself. In the light of the amendment to the Bankruptcy Act of 1926, and the decision of the Supreme Court in the Levy Case, we are forced to the conclusion that the court erred in sustaining the demurrer to the first specification."

The two cases which the Circuit Court of Appeals for the Fourth Circuit refused to follow, in re Tanner, 192 Fed. 572, in re Ford, 14 Fed. (2d) 848, are both decisions of the United States District Court for the Western District of Washington, and are approved by the Circuit Court of Appeals for the Ninth Circuit in its decision in this case below.

In in re Tanner, Supra, Judge Rudkin based his decision upon the ground that the bankrupt, in ob-

taining the surety bond, did not obtain money or property from the surety, coupled with the further fact that it was not obtained on credit, because, says he:

> "The relation of debtor and creditor did not exist after the bond was obtained any more than before."

In in re Ford, Judge Neterer, in following the lead of Judge Rudkin, elaborates a little more fully on the two propositions, and likewise arrives at the conclusion that the act of the bankrupt, in obtaining the surety bond, did not result in his obtaining money or property and did not create the relation of debtor and creditor between the surety company and the bankrupt.

We believe that the Circuit Court of Appeals for the Ninth Circuit recognized the complete fallacy of the argument that the relation of debtor and creditor did not exist between the surety and the bankrupt and, in its opinion the Circuit Court of Appeals does not discuss that question.

In Swarts vs. Siegel, 117 Fed. 13, Judge Sanborn makes the following observation;

> "The accepted and customary definition of the term 'creditor', its definition in the Act of 1898, the clear terms and patent meaning of the provisions of that Act upon the subject under discussion, the better reasons and the greater weight of authority all converge to establish and sustain the conclusion that an endorser, an accommodation maker, or a surety for the bankrupt is his

creditors. The law is well settled that a surety or endorser is a creditor within the meaning of the word 'creditor' as used in the Bankruptcy Act."

Stern v. Paper (D. C. N. D.) 1910, 183 F. 228, 231.

Kobusch v. Hand, (Mo. 1907) 156 F. 660, 84 C. C. A. 372.

Swarts v. Fourth Nat'l. Bank (Mo. 1902) 117 F, 1, 54 C. C. A. 387.

National Bank of Newport v. National Herkimer County Bank (N. Y. 1902) 225 U. S. 178, 32 S. Ct. 633, 56 L. Ed. 1042.

Landry v. Andrews (1901) 22 R. I. 597, 48 A 1036.

Bartholow v. Bean, (Mo. 1874) 18 Wall 635, 21 L. Ed. 866.

Cohen v. Golden (Mass. 1918) 250 F. 599, 162 C. C. A. 615.

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Huntington v. Baskerville (1911) 113 C. C. A. 137, 192 Fed. 813.

Smith vs. Tostevin, (1917) 159 C. C. A. 320, 247 Fed. 102.

Your petitioner submits that the reasoning of the judges in holding that the obtaining of a surety bond is not the obtaining of property is just as faulty as

it was in reaching the conclusion that the surety was not a creditor of its principal on the bond.

The term "property" is comprehensive rather than restrictive and, by its nature, has a large and inclusive scope. At the center of its compass are grouped the readily discernible items of property; as the periphery of its reach is approached, it is less easy to ascertain which subjects fall within or without its limits. The determination of the matters within its province is necessarily a process of relative classification.

In the case of Louisville National Banking Company vs. Pfaffinger, 158 Fed. 402, the Circuit Court of Appeals for the Sixth Circuit said concerning this subject:

> "If we were to apply the rule laid down by Mr. Justice Hunt and take the common ordinary meaning of the word "property," we think we would reach the usual definition given to the word; that is, anything of value, anything that may be owned or possessed, anything which has debt-paying or debt-securing power."

In Samet vs. Farmers and Merchants National Bank of Baltimore, 247 Fed. 669, the Circuit Court of Appeals for the Fourth Circuit says:

> "A note is property because of the value of the contract which it represents. The transfer of a note four months before bankruptcy is a preference under Section 67-E of the Statute. Property is a term of very broad significance, embracing everything that has exchangeable value or goes

> to make up a man's wealth—every interest or estate which the law regards of sufficient value for judicial recognition. So the business world understands it and so the courts should regard it without drawing technical distinctions in the application of the Bankruptcy Statute. * * * It is true that when a note is surrendered at maturity and a new note taken merely as a renewal, the debt is not paid, nevertheless the old note and the renewal are two different pieces of property because they represent two different contracts. One represents a contract with the valuable quality of the right of immediate enforcement; the other represents a contract without that right."

To the same effect are the following cases from the Circuit Court of Appeals for the Eighth and Tenth Circuits:

> Morton vs. Snider, 20 Fed. (2d) 469.
> Erickson vs. Bicknell, 20 Fed. (2d) 729.
> Parrish vs. The City Nat'l. Bank, 32 Fed. (2d) 982.
> Mullen vs. First Nat'l. Bank of Ardmore, 57 Fed. (2d) 711.

The Circuit Court of Appeals for the Ninth Circuit, by its decision below, has constricted the definition of the word "property" within a much shorter radius than did the Circuit Court of Appeals of any Circuit and far beyond any definition of the word as laid down by this Court.

We feel that the law is now well settled that a

promissory note would come within the classification of the word "property" as used in the section of the Bankruptcy Act under consideration.

If this be true, wherein lies any logical distinction between that and a surety bond. A promissory note is an absolute promise to pay money upon a day certain; a surety bond is an absolute promise to pay money to the obligee named in the bond, such promise to become void upon the performance by the principal of the act of defeasance named in the bond.

The surety in this case, the petitioner, most certainly felt that it had parted with property when it signed its obligation to pay $71,000.00 and delivered it to the State of Oregon, and its feeling was confirmed when it was forced to pay the sum of $10,000.00 as a direct result of having executed the bond.

A discharge in bankruptcy is a privilege, an act of grace, and, as one Circuit Court of Appeals has said; in re Bleyer, 215 Fed. 896:

> "Where it clearly appears that the bankrupt has obtained personal pecuniary benefit from false statements, whether regarding his own property or the property of someone else, he does that which prevents him from securing a discharge."

Although the Circuit Court of Appeals for the Ninth Circuit has, in this case, attempted to distinguish its decision from that of the Circuit Court of Appeals of the Fourth Circuit, in Royal Indemnity Company vs. Cooper, Supra, a proper consideration of the matter

will convince the court that they are not distinguishable. The only distinguishing fact is that in the case in the Fourth Circuit, the bankrupt was a personal surety on the same obligation, and by giving the false financial statement to the surety induced the surety to become bound in his place and stead.

Much is said about "extension or renewal of credit," but there was no more an extension or renewal of credit in that case than in the case at bar.

Then too, as far as appears, the financial statement was given to the surety, and the only credit extended by the surety in either of the two cases, that is the case at bar or the case from the Fourth Circuit, was a credit extended in the bond.

The only other element of credit is the credit between the state and the bank, which existed in the Royal Indemnity Company case, but that credit was not extended by virtue of the false statement; that credit was extended by virtue of adequate security.

In order to bring the giving of such a statement within this section of the Bankruptcy Act, it must have been intentionally and knowingly false, coupled with the intention **to deceive the creditor who relies on the statement.**

Gilpin vs. Merchants National Bank, 165 Fed. 607-611; 91 C. C. A. 445.

20 L. R. A. (New Series) 1023.

Firestone vs. Harvey, 174 Fed. 574 C. C. A. (Ohio).

In re Lundberg, 272 Fed. 107, C. C. A. (Ill.).

POINT C.

Probable Conflict with Applicable Decision of this Court.

The Supreme Court of the United States has, in two cases, given us the benefit of its interpretation of the proper definition of the word "property," as used in the Bankruptcy Act and the decision of the Circuit Court of Appeals for the Ninth Circuit below, conflicts with the interpretion placed by the Supreme Court upon the same subject.

> In re Pirie vs. Chicago Title & Trust Company, 182 U. S. 437, 45 Law Ed. 1171.
>
> Gleason vs. Thaw, 236 U. S. 558, 59 Law Ed. 717.

In the first of these cases decided, before the amendment of the Bankruptcy Act, adding the word "money," Mr. Justice McKenna, in speaking for the Court, states:

> "It seems necessarily to mean that a transfer of property includes the giving or conveying of anything of value; anything which has debt-paying or debt-securing power."

In the second of these two cases Mr. Justice McReynolds, in speaking for the court, says of the word "property":

> "At most it denotes something subject to ownership, transfer or exclusive possession and enjoyment which may be brought within the dom-

inion and control of a court through some recognized process."

Either of these two definitions is sufficiently broad to include within its scope the bond which was obtained by the bankrupt in this case, and the money which the surety paid under the terms of that bond.

CONCLUSION.

It is therefore respectfully submitted that this case is one calling for the exercise, by this Court, of its supervisory powers in order that an important question of bankruptcy law, which has not been, but should be, be settled by this Court; that the apparent conflict between the decisions of the various Circuit Courts of Appeal on the same matter be cleared, and that, to such an end, a Writ of Certiorari should be granted, and this Court should review the decision of the Circuit Court of Appeals of the Ninth Circuit and finally reverse it.

ELTON WATKINS,
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Counsel for Petitioner.